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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	
Rate Regulation	)	

LIBERTY MEDIA CORPORATION'S REPLY TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION

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August 4, 1993

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Liberty Media Corporation ("Liberty Media") hereby replies to the oppositions to its petition for reconsideration filed by GTE Service Corporation ("GTE"), Bell Atlantic, BellSouth Telecommunications, Inc. ("BellSouth") and the United States Telephone Association ("USTA") (collectively, the "Telco Parties") and by the National Association of Telecommunications Officers and Advisors, et al. ("NATOA"). In defending the "tier-neutrality" of the Commission's rate benchmarks and its prohibition on the pass-through of affiliated programming cost increases, the Telco Parties and NATOA simply ignore unambiguous statutory provisions as well as the undisputed factual findings of the Commission.

I. The Communications Act Expressly Prohibits the "Common Regulatory Model" Sought By The Telco Parties.

In their oppositions, the Telco Parties continue to repeat the mantra which they have invoked throughout the rule-making proceedings implementing the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"): Cable systems and telephone companies should be subject to a "common regulatory model." BellSouth Opposition at 1; see also USTA Opposition at 2 ("It is fundamentally unfair...to enact different regulatory schemes for telephone companies and for cable operators"); Bell Atlantic Opposition at 1-2 (cable regulations "should be modified to bring them into line with the rules that apply to telephone companies"); GTE Opposition at 16 ("GTE joins Bell Atlantic in supporting symmetry of regulatory treatment of external/exogenous costs for cable operators and local exchange carriers.").

However, the Communications Act clearly prohibits such a "common regulatory model." Local exchange carriers are regulated as common carriers under Title II. Section 621(c) expressly states that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. §541(c). Thus, advocates of "a common regulatory model," "regulatory symmetry," "regulatory parity," "parallel regulation," or any of the other euphemisms for regulating cable systems as if they were telephone companies, simply ignore the fundamental proscription of Section 621(c).

In adopting the 1992 Cable Act, Congress did not leave the language of Section 621(c) intact by accident. See Cable Television Consumer Protection And Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992) ("It is not the Committee's intention to replicate Title II regulation" for cable systems). Rather, the prohibition on common carrier regulation is based on Congressional recognition of the fundamental differences between telephone and cable service. Nearly forty percent of the population to whom cable service is available elect not to receive that service, presumably because other sources of video programming, including broadcast television, are readily available. Clearly, the same cannot be said for telephone service. See, e.g. Cable Telecommunications Act of 1983, S. Rep. No. 67, 98th Cong., 1st Sess. 29 (1983) (unlike telephone service, cable is not "an essential service" requiring imposition of common carrier regulation). Thus, neither the Communications Act nor relevant public policy considerations support the "regulatory parity" arguments raised by the Telco Parties in opposition to Liberty Media's petition.

II. Tier-Neutral Benchmarks Are Inconsistent With The Statutory Criteria For Regulating Basic And Cable Programming Rates.

Even defenders of the Commission's "tier-neutral" benchmarks are forced to acknowledge that in enacting the 1992 Cable Act, Congress "did establish two separate sections for regulation of basic rates, §623(b), and cable programming

service rates, §623(c)." GTE Opposition at 2; see also NATOA Opposition at 9 n.9 (the basic rate factors under the statute "differ slightly" from the cable programming service factors). However, these parties desperately attempt to portray the two different sections as saying the same thing -- a sort of statutory stutter. See GTE Opposition at 2 (the "substantive requirements" of the two sections "are remarkably alike"); NATOA Opposition at 9 n.9 (the difference in the statutory criteria for basic and other cable program rates "does not mean that Congress mandated a different method of regulation for each tier"). In advancing these arguments to support the Commission's tier-neutral benchmarks, GTE and NATOA ignore the plain language of the statute and fundamental principles of statutory construction.

Contrary to the characterizations advanced by GTE and NATOA, the statute includes fundamentally different criteria for regulating basic and other cable programming service rates. Compare Section 623(b)(2)(C) with Section 623(c)(2). As Liberty media and other petitioners have demonstrated, only two of the statutory criteria overlap. See Liberty Media Petition at 6-8; National Cable Television Association, Inc. Petition at 5; Booth American Company, et al. ("Booth American") Petition at 4. Nevertheless, GTE provides its own convoluted explanation of the statutory provisions in an unsuccessful attempt to show that the different provisions really mean the same thing. GTE Opposition at 2-5. Likewise, NATOA points to selected portions of the legislative history

in attempting to show that Congress actually intended to apply uniform criteria to basic and other cable programming rates. NATOA Opposition at 10 n.10. GTE's explanation of the statute and NATOA's interpretation of the legislative history are inconsistent with the controlling and unambiguous language of the statute itself. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41 (1989) (where the language of the statute is unambiguous, "there generally is no need...to inquire beyond the plain language of the statute").

Moreover, neither GTE nor NATOA addresses the fact that the Commission relied exclusively on one statutory factor (the rates charged by systems facing effective competition) and ignored all other factors. See Liberty Media Petition at 9-13. Because Congress expressly stated that the Commission "shall consider" the specified factors in determining whether cable programming rates are unreasonable, the Commission is not free to disregard those statutory factors. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (an agency is not free to ignore the "unambiguously expressed intent of Congress").

NATOA seeks to minimize this infirmity of the uniform benchmark approach by arguing that the Commission arrived at the "tier-neutral" benchmarks "based on a balancing of the factors" it was required to consider. NATOA Opposition at 9 n.9. However, examination of the record, including the survey form which yielded the data upon which the benchmarks are based, clearly reveals that the Commission not only failed to

"balance" certain of the statutory factors (i.e. reasonable profit, programming costs and rate history), but also failed to gather any information regarding those factors. See Liberty Media Petition at 9-13; Booth American Petition at 5-8.

In short, NATOA and GTE simply cannot reconcile the Commission's tier-neutral benchmarks with the requisite statutory criteria and the record in this proceeding. The Commission should reconsider its "tier-neutral" benchmarks and adjust them in accordance with the factors set forth in the statute.

III. Prohibition of Affiliated Programming Cost Pass-Throughs Is Unnecessary.

GTE and NATOA also oppose Liberty Media's petition for reconsideration of the prohibition on the pass-through of cost increases for programming affiliated with the cable operator. See GTE Opposition at 15-16; NATOA Opposition at 10-14. However, neither party responds to Liberty Media's argument that prohibition of such pass-throughs is unnecessary to protect against the potential harm perceived by the Commission. See Liberty Media Petition at 17-18.

GTE simply "opposes the expansion of the definition of external costs to include the programming costs of a programmer affiliate of a cable operator" because "LECs are not accorded external or exogenous treatment" of affiliated transactions "in their price cap indices." GTE Opposition at 15-16. NATOA claims that pass-throughs of affiliated programming

cost increases "would gut -- and render meaningless -- the benchmark regulatory regime established by the Commission." NATOA Opposition at 10. Specifically, NATOA claims that because "the Commission's benchmark rates generally reflected all costs incurred by a cable operator," external treatment of programming cost increases would permit the cable operator "to recover these costs a second time." Id. at 12.

Both GTE and NATOA ignore the fundamental reason for the Commission's decision to permit programming cost pass-throughs in the first place -- the record evidence in this proceeding demonstrating that "programming costs have increased at a rate far exceeding the rate of inflation." Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177 (rel. May 3, 1993), at ¶251. Contrary to NATOA's claims, programming cost increases after October 1992 are not included in the benchmarks. Moreover, because the price cap mechanism which governs post-benchmark rate increases is tied to inflation, it cannot compensate for program cost increases which clearly exceed that rate.

GTE and NATOA offer no legitimate reason for permitting cable operators unaffiliated with programmers to recover fully their increased programming costs while limiting cost increases attributable to affiliated programmers only to the rate of inflation. As Liberty Media and others have suggested, there is no need for such draconian treatment of

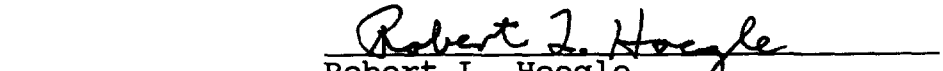
affiliated programming costs, and no party opposing the pass-through of such cost increases has provided one.[1]

CONCLUSION

The Commission should reconsider its decision to adopt tier-neutral benchmarks and to prohibit the pass-through of affiliated programming cost increases. Cable operators cannot be regulated as common carriers, and tier-neutral benchmarks are contrary to the dual regulatory framework required by the statute. Increases in the cost of both affiliated and unaffiliated programming services have exceeded the rate of inflation such that non-discriminatory cost pass-throughs are necessary and appropriate.

Respectfully submitted,

August 4, 1993



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[1] The Commission also would have an opportunity to ensure that programmers did not charge discriminatorily high prices to affiliated cable operators in cost-of-service proceedings. Thus, the Commission has solicited comment on the appropriate methodology for reviewing increases in expenditures for affiliated programming in such proceedings. See, Notice of Proposed Rulemaking, MM Docket No. 93-215, FCC 93-353 (rel. July 16, 1993), at ¶67 n.70.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Liberty Media Corporation's Reply to Oppositions to Its Petition for Reconsideration" were served this 4th day of August, 1993 by first-class mail, postage prepaid, upon the following:

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